SANJIV

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1141 OF 2006

Shri Mitlesh Kumar Sinha. ....Petitioner

Vs.

M/s. Ahsan Exports Pvt. Ltd. & Anr. ....Respondents

Mr Ajay Panicker for Petitioner.

Mr. Ishrat R. Ladiwala for respondent 1.

Ms. M. M. Deshmukh, APP for the State.

CORAM : SMT. RANJANA DESAI, J.

DATE : 16TH NOVEMBER, 2006.

P. C.:-

1. In this petition filed under Article 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure-1972, the petitioner has prayed that, order dated 07/03/2006 passed by the Additional Sessions Judge, Greater Bombay in Criminal Revision Application No. 1337 of 2005 be set aside. The petitioner is

original

accused 4. Respondent 1 is the original complainant. Respondents 2 to 4 are original accused 1 to 3 respectively and respondent 5 is original accused 5.

2. The case of the complainant/respondent 1 is that the petitioner is one of the directors of a Company by name M/s. Ahsan Exports Private Limited and three other accused who are respondents 2 to 5 herein. Respondent 1 was induced by the petitioner and other directors to place an order for notebook computer system vide purchase order dated 05/08/2002 at an agreed consideration and believing the said representation to be true, respondent 1 issued a cheque for the sum of Rs.96,250/- drawn on ABN-AMRO Bank towards 50% amount as an advance of the said consideration. According to the complainant the said cheque was duly encashed by the accused. It is further the case of the complainant that while accepting the above order, the accused apprised the complainant that the delivery of the goods would be made within 2 weeks. All the accused persons deliberately failed and neglected to deliver the same as agreed to the complainant.

3. According to the complainant, accused 1 at the instance of accused 2 to 4, in discharge of their legal liabilities for valuable consideration towards the re-payment of the said advance payment, issued a cheque in favour of the complainant for the sum of Rs.96,250/- drawn on Tamilnadu Mercantile Bank Ltd. Andheri (West), Mumbai. The said cheque when presented for encashment, was dishonoured by the bankers with the remark 'insufficient funds'. Thereafter, after issuing necessary notice and since the accused had failed to make payment, the complainant filed complaint in the court of Additional Chief Metropolitan Magistrate, Esplanade Court, Mumbai.

4. On this complaint, the learned Magistrate issued process. The petitioner who is arraigned as accused 4, challenged the order of issuance of process by preferring Criminal Revision Application No. 1337 of 2005 in the Sessions Court, Greater Bombay. By the impugned order, the learned Sessions Judge dismissed the criminal revision application. The said order is challenged in this petition.

5. I have heard the learned counsel appearing for the

petitioner at length. He submitted that the learned Sessions Judge has not considered any of the arguments advanced by the petitioner's counsel. He has wrongly observed that arguments of the defence are merely based on oral and documentary evidence which cannot be appreciated by the revisional court but trial court can take it into consideration while proceeding under Section 254 of the Criminal Procedure Code (“The Code”, for short) and can dispose of the matter under Section 255 of the Code on merits in a summary proceeding. According to the learned counsel this approach of the learned Sessions Judge is totally erroneous. He submitted that the petitioner's counsel's submissions have been dealt with by the learned Sessions Judge by merely observing that “no case is made out by the accused”. He therefore prayed that impugned order be set aside as there is no proper consideration of the petitioner's case.

6. On merits the learned counsel for the petitioner contended that there is no averment in the complaint that at the time when cheque was presented and cheque was dishonoured or during the period of 15 days after the statutory notice was issued, the present

petitioner was responsible for making payment or that he was in-charge of the day to day affairs of the company or that he was director of the company. The learned counsel pointed out that on 30/09/1995 the petitioner retired from State Bank of India, where he was serving. He joined accused 5 on 27/05/2000. He resigned on 26/02/2001. The learned counsel draw my attention to the letter addressed by the petitioner to the Company Registrar and a xerox copy of the Form 32 and also the annual return of the company. The learned counsel urged that according to the complainant, the accused company placed the purchase order with the complainant on 05/08/2002. The cheque was issued on 18/10/2002 and the cheque was dishonoured on 08/11/2002. Notice was issued on 21/11/2002. He submitted that during this relevant period, the petitioner was not even a director of the accused company. He submitted that there is no averment in the petition that it was the petitioner who was responsible to make payment. He submitted that in the circumstances the instant complaint deserves to be quashed. In support of his contentions, the learned counsel relied on the judgment of the

Supreme Court, in ***S. M. S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr. AIR 2005, S. C. 3512***, and the judgments of this court in ***Saumil Dilip Mehta Vs. State of Maharashtra, 2002(2) Bom. C. R. 594*** and in ***Mansoor Ali Khan Pataudi Vs. M/s. Ram Niranjan Kedia Tours and Travels Pvt. Ltd. & Anr. 2005 ALL MR(Cri) 3096*** and unreported judgment of this Court in ***Madanlal Taparia & Anr. Vs. The Bank of Rajasthan Ltd. In Cr. Writ Petition No. 2241 of 2004 dated 14/12/2004.***

7. Learned counsel for respondent 1, on the other hand relied on the judgment of the Supreme Court in ***S. V. Muzumdar Vs. Gujrat State Fertilizer Co. Ltd. AIR 2005 Supreme Court 2436*** and judgment of this court in ***M/s. S. B. & T. International Ltd. V. State of Maharashtra & Anr. 2006 Cri. L. J. 1541.*** He submitted that the necessary averments are made in the complaint. He submitted that whether or not the petitioner was a director at the relevant time, whether he was responsible for the day to day affairs of the company is a matter of evidence and the complaint cannot be quashed on such ground.

8. I have applied my mind to the submissions advanced by

both sides. In ***S. M. S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr. case (supra),*** the Supreme Court has laid down that it is necessary to specifically aver in a complaint under Section 141 of Negotiable Instruments Act that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. It is further observed that merely being a director of a company is not sufficient to make the person liable under Section 141 of the said Act and the requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time and this has to be averred as a fact as there is no deemed liability of a director in such cases.

9. There can be no dispute about these propositions. This authoritative pronouncement of the Supreme Court has been followed in all later judgments and I am bound by it. The question is whether in the facts of this case it can be said that on the basis of this judgment the instant complaint must be quashed. In my opinion, this

is not a case where the complaint could be quashed because the present complaint answers the test laid down by the Supreme

Court in ***S. M. S. Pharmaceuticals Ltd. Vs. Neeta Bhalla's case (supra).*** In the complaint, the complainant has stated that accused 5 is a Private Limited Company which is incorporated under the provisions of the Companies Act 1956. Accused 1 to 4 are the directors of the said company and they are responsible for the day to day activities of the business of the said company. It is further stated that, accused 1 alongwith the other directors at the relevant time and authorized signatory approached the office of the complainant. Thereafter, the details of the representation made by the accused to the complainant are stated. It is further stated that accused 1 to 4 apprised the complainant that the delivery of the goods would be made within 2 weeks. It is further stated that, however, all the accused have deliberately failed and neglected to deliver the goods as agreed to the complainant. It is further submitted that all the accused have deliberately avoided making delivery till date by giving false promises. It is further stated that accused 1 at the instance of accused

2 to 4 in discharge of their legal liabilities for valuable consideration towards the repayment of the said advance payment, which they had

fraudulently obtained from the complainant had issued a cheque alongwith a forwarding letter dated 18/09/2004 in favour of the complainant for Rs.96,250/- vide cheque No. 020525 dated 18/10/2004 drawn on Tamilnadu Mercantile Bank Ltd. and the accused had assured the complainant that they had sufficient funds. After narrating the circumstances, in which the cheque was dishonoured. It is again stated that all the accused had issued the said cheque with the dishonest intention and accused 1 to 4 alongwith accused 5 have committed offences under Section 138 r/w 141 and 142 of the Negotiable Instruments Act. All these later averments will have to be read keeping in mind the averments made at the outset in paragraph 2 of the complaint that accused 1 to 4 are directors and incharge of and responsible for the day to day activities of the business of accused 5, company. In my opinion, it is reasonable to presume at this stage that persons who are responsible for the day to day activities of the business of a company are also responsible for

accepting the work orders and issuing cheques. Whether, this is true or not only evidence will tell.

10. According to the petitioner, he had resigned from the directorship of the company. Xerox copy of Form No. 32 is shown to me. It is contended that therefore the petitioner cannot be roped in as an accused. In this connection, reliance is placed on ***Mansoor Ali Patodi's case (supra).*** It is true that in the facts of the case before it, in that case, this court held that there was evidence that the accused had resigned from the company, that his resignation was accepted and that the intimation was sent to the Registrar of Companies. Certified copy of the Form No. 32 was filed in the Court. This court quashed the complaint, on that ground qua the petitioner therein. It is significant to note that in ***M/s. S. B. & T. International Ltd.'s case (supra)*** while dealing with similar fact-situation, this court has held that Form No. 32 is undoubtedly a public document but even that document will have to be proved in evidence in defence by the accused. While coming to this conclusion, this Court has placed reliance on a decision of this Court dated 23/12/2004 in ***Vijay Mallya***

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Vs. State of Maharashtra and ors. (Criminal Application No. 4827 of 2004). These view commends itself to me.

11. Form No. 32 will have to be properly brought on record. It

is only when evidence is adduced that this submission can be properly appreciated. So far as the other judgments cited by the petitioner are concerned, they must be confined to the facts of those cases. In my opinion, they have no application to the present case. For the above reasons, I am of the opinion that there is no substance in this petition. The petition is, therefore, rejected.

(SMT. RANJANA DESAI, J)